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NO. 86-817

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In the
Supreme Court of the United States

OCTOBER TERM, 1986

C. T. CARDEN, LEONARD L. LIMES, AND
MAGEE DRILLING COMPANY,
Petitioners,

V.

ARKOMA ASSOCIATES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
No. 86-817

C. T. Carden, Leonard L. Limes, and
Magee Drilling Company,

Petitioners

versus

Arkoma Associates, et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

This brief is submitted by petitioners, C. T. Carden (hereinafter "Carden"), Leonard L. Limes (hereinafter "Limes"), and Magee Drilling Company (hereinafter collectively "Petitioners") in reply to the opposition brief of Arkoma Associates (hereinafter "Respondent").

It will be recalled that Petitioners seek review of the Fifth Circuit Court of Appeals (hereinafter "Fifth Circuit") decision to the effect that the citizenships of the general partners alone need be considered, and that of the limited partners of a limited partnership may be ignored, when

determining diversity jurisdiction pursuant to 28 USC 1332 (a).

Petitioners, Carden and Limes, are citizens of Louisiana as is Henry Stram, one of Respondent's limited partners. Petitioners contend that this identity of citizenship among opposing parties destroys diversity jurisdiction. This contention is supported by the decision of this Court in *Navarrao Savings Association v. Lee*, 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d. 425 (S. Ct. 1980); the decisions of the Third Circuit in *Carlsberg Resources Corporation v. Cambria Savings & Loan Association*, 554 F 2d 1254 (3rd Cir. 1977) and *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F 2d 29 (3rd Cir. 1981); of the Fourth Circuit in *New York State Teachers Retirement System v. Kalkus*, 764 F 2d 1015 (4th Cir. 1985); and of the Seventh Circuit in *Elston Investments, Ltd. v. David Alteman Leasing Corporation*, 731 F 2d 436 (7th Cir. 1984).

The Second Circuit and Fifth Circuit, on the contrary, hold that only the citizenships of the general partners of a limited partnership need be considered when determining diversity jurisdiction, e g. *Lee v. Navarro Savings Association*, 597 F 2d 421 (5th Cir. 1979); *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F 2d 238 (5th Cir. 1986); and *Colonial Realty Corporation v. Bache & Company*, 358 F 2d 178 (2nd Cir. 1966).

Respondent does not address the foregoing conflict in the decisions of the various circuits, but urges this Court to deny certiorari because, it contends, the Court of Appeals' decision not to review a matter certified to it under 28 U.S.C. 1292(b) is itself not reviewable.

Respondent errs on two counts: (1) The Fifth Circuit did not refuse to review the district court's judgment as Respondent suggests. Rather, the Fifth Circuit decided the issue by holding that its decision in the companion case of *Mesa Operating Limited Partnership*, *supra*, was dispositive of the jurisdiction issue. Therefore, the appeal at hand would not "materially advance the ultimate termination of the litigation" as required by 28 U.S.C. 1292(b) because such an appeal would fail. (See the Fifth Circuit opinion attached to Petitioners' original application as Appendix "B"); and (2) although the general rule is that an interlocutory plea in abatement is not reviewable, a well recognized exception exists when the plea is one dealing with the jurisdiction of the court.

28 U.S.C. 2105 (hereinafter "Section 2105") states:

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement *which do not involve jurisdiction.*"

(Emphasis added) *Section 2105* was interpreted by this Court in *Snyder v. Buck*, 340 U. S. 15, 71 S. Ct. 93, 95 L. Ed. 15 (S. Ct. 1950) in which Snyder successfully sought to obtain certain benefits from Buck as paymaster general of the Navy in the trial court. Buck retired and was replaced by another officer, but an appeal was perfected in Buck's name after retirement. The court of appeals ordered the case dismissed because, upon Buck's retirement, the case abated. The Supreme Court affirmed the court of appeals but in doing so found that the high court had authority to hear the appeal in that the absence of a necessary party was a matter of jurisdiction, to wit:

"Nor is there any barrier to our review of this ruling on abatement by 28 U. S. C. 2105, 28 U.S.C.A. 2105, which prohibits a reversal by the Court of Appeals or this Court for error in ruling upon matters in abatement "which do not involve jurisdiction." The absence of a necessary party and the statutory barrier to substitution go to jurisdiction."

In the earlier case of *Goldey v. The Morning News*, 156 U.S. 518, 15 S. Ct. 59, 39 L. Ed. 517 (S. Ct. 1895), this Court held that it had appellate jurisdiction to review a judgment dismissing the case below on a plea in abatement because such plea went to the question of jurisdiction. So holding, the Court stated:

"The defendant in error has interposed a preliminary objection that the judgment of the circuit court upon this question cannot be reviewed, because of the provision of the statutes, that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court" . . . But that provision, which has been part of the judiciary acts of the United States from the beginning, has never been, and in our opinion should not be construed as forbidding the review of a decision, even on a plea in abatement, of any question of the jurisdiction of the court below to render judgment against the defendant . . ."

It is clear, therefore, that Respondent is in error in its contention that this Court may not grant certiorari to review a judgment rendered below on a motion to dismiss for lack of diversity jurisdiction.

CONCLUSION

This Court should grant certiorari, reverse the Fifth Circuit Court of Appeals, and dismiss this action for lack of diversity jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Reply Brief of Petitioners have been served on Mitchell J. Hoffman, attorney for Respondent by depositing same in the United States Mail, postage prepaid properly addressed to Mitchell J. Hoffman, 21st Floor Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130.

Richard K. Ingolia

